



nature and extent of disability for each, and (4) whether respondent is entitled to a credit under K.S.A. 44-510a (Ensley).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds:

The Appeals Board agrees with the analyses and conclusions of the Administrative Law Judge and adopts the findings set forth in the Award as its own to the extent they are not inconsistent with those specifically made herein. The Appeals Board finds that claimant sustained two work-related accidents and is entitled to receive workers compensation benefits for both.

(1) Claimant has sustained two work-related accidents.

Claimant initially injured his right shoulder on November 3, 1992 while working for the respondent when he attempted to remove a stubborn screw. Claimant immediately reported the accident and began receiving medical treatment. In December 1992, claimant underwent the first of two right shoulder surgeries performed by Dr. Morris.

Claimant returned to work for respondent in April 1993. Although claimant had significant work restrictions and limitations, respondent returned claimant to his former job as an airplane modification mechanic. Immediately upon his return to work, claimant began to experience pain in his right shoulder which progressively increased in severity until he left work around June 15 or June 17, 1993. Claimant returned to Dr. Morris who found a re-tear in the right rotator cuff and performed the second right shoulder surgery in July 1993. The Appeals Board finds claimant's last day of work, or June 17, 1993, should be considered the date of accident for the second injury sustained by claimant.

Both physicians who testified in this proceeding, Ernest R. Schlachter, M.D., and Kenneth D. Zimmerman, M.D., indicated that claimant sustained two separate accidents. Dr. Zimmerman testified claimant had a 6 percent whole body functional impairment after the November 1992 injury and his first surgery. After the second injury and surgery, Dr. Zimmerman, in apparent agreement with Dr. Morris, believes that claimant now has a 21 percent whole body functional impairment and should neither climb nor perform overhead work, perform bench/waist work only, and restrict lifting to 30 pounds at bench work height only. Dr. Schlachter testified that claimant should not use his right arm in any significant manner, perform overhead work, or work with his right arm away from his body. However, Dr. Schlachter believes claimant may lift up to 25 pounds with his right elbow at his side, lift up to 5 pounds with his arm away from his body and climb stairs and ladders if he does not carry any items of weight. Dr. Schlachter believes claimant now has a 25 percent whole body functional impairment with 75 percent of that rating associated with the November 1992 injury and 25 percent associated with the second injury.

**(2) Claimant has a 12.5 percent permanent partial general disability from the November 1992 accident.**

The Appeals Board agrees with the Administrative Law Judge that claimant is entitled to receive permanent partial general disability benefits based upon his 12.5 percent functional impairment rating for the November 1992 accident. The Administrative Law Judge averaged the 18.75 percent (75 percent of 25 percent) whole body functional impairment rating provided by Dr. Schlachter with the 6 percent whole body functional impairment rating provided by Dr. Zimmerman. The Appeals Board accepts that analysis. Claimant returned to work for the respondent earning a comparable wage after recovering from the November 1992 injury. Therefore, there is a presumption of no work disability for that accident. That presumption has not been overcome.

**(3) Claimant has a 68 percent work disability from the June 1993 accident.**

Regarding the accident which claimant sustained during the period he returned to work for the respondent in April 1993 through June 17, 1993, the Appeals Board agrees with the Administrative Law Judge that claimant has proven a 68 percent work disability under the provisions of K.S.A. 1992 Supp. 44-510e. That statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Administrative Law Judge found the opinions of labor market expert Jerry D. Hardin to be more persuasive than those of Maurice Entwistle. The Appeals Board agrees with that conclusion. Mr. Hardin testified that, according to Dr. Morris' final restrictions and limitations, claimant lost 60 to 65 percent of his ability to perform work in the open labor market and 66 to 74 percent of his ability to earn comparable wages, depending upon whether one considers the value of claimant's additional compensation items. In his determination of wage loss, Mr. Hardin assumed claimant retained the ability after his accident to earn \$260 per week. On the other hand, Mr. Entwistle testified that claimant has lost 35 percent of his ability to perform work in the open labor market and 22 percent of his ability to earn comparable wages. In his analysis, Mr. Entwistle reduces the "technical" wage loss by half to arrive at the wage loss he considers appropriate because he believes that respondent pays exceptionally high wages. As did the Administrative Law Judge, the Appeals Board rejects that analysis. The Appeals Board also finds Mr. Entwistle's opinion regarding loss of ability to perform work in the open labor market to be inordinately low and less persuasive than Mr. Hardin's opinion when considering the severity of claimant's injuries which has effectually limited claimant to working with one arm.

In arriving at the 68 percent work disability for the June 1993 accident, the Administrative Law Judge averaged a 75 percent loss in ability to earn a comparable wage with a 62.5 percent loss of ability to perform work in the open labor market. The Appeals Board approves of that analysis and adopts it as its own. The 75 percent loss of ability to earn a comparable wage is supported by the evidence and obtained by comparing the \$260 wage figure provided by Mr. Hardin to claimant's average weekly wage of \$1,025.09, as determined below.

The respondent argues that claimant should be limited to permanent partial disability benefits based upon his functional impairment rating. The Appeals Board disagrees. The respondent has not offered claimant accommodated employment but, instead, has declared him permanently and totally disabled and has placed him on a medical leave of absence. Claimant has applied to return to work for the respondent but has not been accepted back. The rationale of Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), where claimant was denied permanent partial disability benefits in excess of her functional impairment rating because she refused to attempt to perform an accommodated position paying comparable wage, does not apply. In the proceeding now before us, there has been neither an offer nor refusal of an accommodated position.

**(4) Average weekly wage.**

For the November 1992 accident, the Appeals Board finds claimant's average weekly wage for the period from November 3, 1992 to June 17, 1993 to be \$918.26 which is comprised of \$772.80 in weekly base wage and \$145.46 in weekly overtime. Because claimant's additional compensation items were terminated after claimant left work on June 17, 1993, the average weekly wage is increased by the value of those discontinued benefits, or \$219.70, to produce an average weekly wage of \$1,137.96 for the period commencing June 17, 1993.

The Appeals Board finds that claimant's average weekly wage at the time of the second accident, which is found to be claimant's last day of work on June 17, 1993, to be \$1,025.09 which is comprised of \$772.80 in weekly base wage, \$52.76 in weekly overtime, and \$199.53 in weekly additional compensation items.

**(5) A credit pursuant to K.S.A. 44-510a (Ensley) is applicable.**

The Appeals Board also finds the respondent is entitled to a credit under the provisions of K.S.A. 44-510a (Ensley) and that the disability from the November 1992 accident contributes 100 percent to the disability resulting from the June 1993 accident. As provided by statute, the credit is applicable for the overlapping weeks of permanent partial disability benefits that are payable for the November 1992 and June 1993 accidents.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated February 27, 1996 should be modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Charles F. Gamble, and against the respondent, The Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury which occurred November 3, 1992, for 27 weeks of temporary total disability compensation at the rate of \$299 per week, or \$8,073, followed by \$76.53 per week for 5.29 weeks or \$404.84, of permanent partial general disability benefits based upon an average weekly wage of \$918.26, followed by \$94.84 per week for 382.71 weeks, or \$36,296.22, of permanent partial general disability benefits based upon an average weekly wage of \$1,137.96, making a total award of \$44,774.06 for a 12.5% whole body functional impairment.

As of July 26, 1996, there is due and owing claimant 27 weeks of temporary total disability compensation at the rate of \$299 per week or \$8,073 and 5.29 weeks of permanent partial general disability compensation at the rate of \$76.53 per week, totalling \$404.84, and 162.14 weeks of permanent partial general disability compensation at \$94.84 per week, or \$15,377.36, totalling \$23,855.20, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$20,918.86 is ordered paid for 220.57 weeks at \$94.84 per week until fully paid or further order of the Director.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Charles F. Gamble, and against the respondent, The Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury which occurred June 17, 1993, and based upon an average weekly wage of \$1,025.09 for 83 weeks of temporary total disability compensation at the rate of \$299 per week or \$24,817, followed by 299.71 weeks at the reduced rate of \$204.16 per week or \$61,188.79, followed by 32.29 weeks at the rate of \$299 per week

or \$9,654.71, for a 68% permanent partial general disability, making a total award of \$95,660.50.

As of July 26, 1996, there is due and owing claimant 83 weeks of temporary total disability compensation at the rate of \$299 per week or \$24,817, followed by 79.14 weeks permanent partial compensation at the reduced rate of \$204.16 per week or \$16,157.22, for a total due and owing of \$40,974.22. The remaining balance of \$54,686.28 is ordered paid for 220.57 weeks at the rate of \$204.16 per week, and 32.29 weeks at the rate of \$299 per week until fully paid or further order of the Director.

Pursuant to stipulation, the Workers Compensation Fund is ordered to pay 50 percent of the benefits and costs associated with this proceeding.

The Appeals Board hereby adopts the remaining orders set forth in the Award entered by the Administrative Law Judge to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael T. Harris, Wichita, KS  
Vaughn Burkholder, Wichita, KS  
Andrew E. Busch, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director